PP

v.

KU YAHYA KU BAHARI & ANOR

HIGH COURT MALAYA, IPOH
PS GILL J
[CRIMINAL APPEAL NO: 42-13-98]
23 FEBRUARY 1999

EVIDENCE: *Burden of proof - Accused's burden - Statutory presumption - Shifting of burden - Rebuttal of presumption on a balance of probabilities - Whether merely to cast a reasonable doubt - Whether misdirection on burden of proof curable - Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a) & 14*

CRIMINAL PROCEDURE: *Trial - Misdirection of law - Burden of proof - Accused's burden - Statutory presumption - Shifting of burden - Rebuttal of presumption on a balance of probabilities - Whether merely to cast a reasonable doubt - Whether misdirection on burden of proof curable - Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a) & 14*

The appellants were charged in the Sessions Court for offences under ss. 3(a)(ii) & 4(a) of the Prevention of Corruption Act 1961 ('the Act'). They were convicted on all counts and this was their appeal against conviction.

The sole issue for consideration in this appeal was the effect of a misdirection of law by the Sessions Court on the burden of proof in a criminal trial.

Held:

[1] The principle of Malaysian criminal law is that the general burden of proof lies, throughout the trial, on the prosecution to prove beyond a reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, the accused's duty is merely to cast a reasonable doubt on the prosecution's case.

[2] However, when the prosecution invokes the presumption under s. 14 of the Act, then a particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumption on a balance of probabilities. This, from a defence point of view, is heavier than the burden of casting a reasonable doubt but is lighter than the burden of the prosecution to prove beyond a reasonable doubt.

[3] The sessions judge failed to appreciate the distinction involved, when invoking the presumption under s. 14 of the Act, in terms of the burden of proof which rested with the accused, to rebut on a balance of probabilities. Instead the judge held that having heard the defence of both the accused, which was a complete denial, the accused had failed to create a doubt in the prosecution's case. This was obviously a misdirection of law. It should have been held that the accused had failed to rebut the presumption invoked under s. 14 of the Act on a balance of probabilities for the charge under s. 4(a) of the Act.

[4] It was incumbent on the sessions judge, as a separate exercise, to decide whether the charge under s. 3(a)(ii) of the Act had been established beyond a reasonable doubt by the prosecution, or if the presumption was invoked, whether the accused had rebutted it on a balance of probabilities. Even if the presumption was invoked, it did not detract the duty of the prosecution to still prove its case beyond a reasonable doubt.

[5] Such a misdirection of law on the burden of proof could not be passed over lightly as a mere irregularity, because it was incurably illegal as being in contravention of a strictly imperative provision. It was a misdirection that went to the very root of the matter as it involved a principle of general importance in the administration of justice.

[Conviction quashed; retrial ordered.]

Case(s) referred to:
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(refd)***
Ishak Shaari v. PP [1997] 3 CLJ Supp 223 ***(refd)***
PP v. Khoo Hi Chiang [1994] 2 CLJ 151 ***(dist)***
PP v. Surandran Rajaretnam [1998] 2 CLJ 207 ***(refd)***
Re Tan Boon Liat & Anor [1977] 2 MLJ 108 ***(refd)***
Thomas v. R [1960] 102 CLR 584 ***(foll)***
Yap Sin Hock v. PP [1992] 2 MLJ 714 ***(refd)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a), 14

For the appellants - Abdul Roni; M/s Hairany, Roni & Anikah
For the respondent - Ahmad Bache

Reported by Ling Hea Hoon

JUDGMENT

PS Gill J:

The sole issue for determination in this appeal in the effect of a misdirection of law by the Sessions Court on the burden of proof in a criminal trial.

The appellants were charged in the Sessions Court for the following charges:

> Dalam kes 61-15-97 Ku Yahya bin Ku Bahari dituduh dengan pertuduhan-pertuduhan berikut:
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> **Pertuduhan Pertama**
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> Bahawa kamu pada 24 Januari 1997 jam lebih kurang 8.30 malam, di Restoran K C No. 2, Dataran Tasek Timor 6, Taman Maju, Bercham, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah secara rasuah memujukrayu untuk diri kamu sendiri suatu suapan, iaitu wang tunai sebanyak RM50 (Ringgit Malaysia Lima Puluh) seminggu daripada seorang bernama Ng Gaik Heok sebagai suatu dorongan untuk kamu sendiri sebagai seorang Penjawat Awam, iaitu Koperal Polis No. RF 59791 yang bertugas di Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Ipoh, untuk tidak melakukan suatu perkara yang kena mengena dengan badan awam itu, iaitu untuk tidak mengambil tindakan ke atas satu kelab perjudian haram yang diuruskan oleh Ng Gaik Heok di No. 32A, Dataran Tasek Timur 6, Taman Bercham Maju, Ipoh dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(a)(ii) Akta Pencegah Rasuah, 1961 (Undang-Undang Malaysia Akta No. 57) yang boleh dihukum di bawah Seksyen 3 Akta yang sama.
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> **Pertuduhan Kedua**
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> Bahawa kamu pada 27 Januari, 1997 jam lebih kurang 9.10 malam, di C.C. Coffee House, No. 22 Persiaran Bercham Selatan 2, Taman Desa Kencana, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, sebagai seorang ejen Kerajaan Malaysia, iaitu Koperal Polis No. RF 59791 yang bertugas di Jabatan Siasatan Jenayah, Ibu Pejabat Daerah Polis Ipoh, Perak telah secara rasuah menerima bagi diri kamu sendiri suatu suapan, iaitu wang tunai sebanyak RM50.00 (Ringgit Malaysia Lima Puluh) daripada seorang Ng Gaik Heok sebagai suatu dorongan kepada kamu untuk tidak melakukan satu perbuatan berhubung dengan hal ehwal prinsipal kamu, iaitu untuk tidak mengambil tindakan keatas satu kelab perjudian haram yang diuruskan oleh Ng Gaik Heok di No. 32A, Dataran Tasek Timur 6, Taman Bercham Maju, Ipoh dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 4(a) Akta Pencegah Rasuah, 1961 (Undang-undang Malaysia Akta No. 57) yang boleh dihukum di bawah Seksyen 4 Akta yang sama.
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> Dalam kes 61-16-97 Omar bin Ab. Rahman dituduh dengan pertuduhan berikut:

Tuduhan Pertama:

Bahawa kamu pada 27 Januari, 1997 jam lebih kurang 9.00 malam, di C.C. Coffee House, No. 22, Persiaran Bercham Selatan 2, Taman Desa Kencana, Ipoh di dalam Daerah Kinta di dalam Negeri Perak, telah secara rasuah memujuk rayu untuk diri kamu sendiri suatu suapan, iaitu wang tunai sebanyak RM300.00 (Ringgit Malaysia: Tiga Ratus) seminggu daripada seorang bernama Ng Gaik Heok sebagai suatu dorongan untuk kamu sendiri sebagai seorang penjawat awam, iaitu Inspektor Polis No. I/12288 yang bertugas di Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Ipoh, untuk tidak melakukan suatu perkara yang dicadangkan dan yang kena mengena dengan badan awam itu, iaitu untuk tidak mengambil tindakan keatas satu kelab perjudian haram yang diuruskan oleh Ng Gaik Heok di No. 32A, Dataran Tasek Timur 6, Taman Bercham Maju, Ipoh dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(a)(ii) Akta Pencegah Rasuah, 1961 (Undang-undang Malaysia Akta No. 57) yang boleh dihukum dibawah Seksyen 3 Akta yang sama.

Tuduhan Kedua:

Bahawa kamu pada 27 Januari, 1997 jam lebih kurang 9.00 malam, di C.C. Coffee House, No. 22, Persiaran Bercham Selatan 2, Taman Desa Kencana, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah secara rasuah memujuk rayu bagi pihak dua puluh empat orang anggota polis yang dikatakan memerlukan suatu suapan, iaitu wang tunai sebanyak RM50.00 (Ringgit Malaysia: Lima Puluh) sebulan bagi setiap 24 orang anggota Polis tersebut daripada seorang bernama Ng Gaik Heok sebagai suatu dorongan untuk mereka sebagai penjawat awam iaitu anggota polis yang bertugas di Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Ipoh, untuk tidak melakukan suatu perkara yang kena mengena dengan badan awam itu, iaitu untuk tidak mengambil tindakan keatas satu kelab perjudian haram yang diuruskan oleh Ng Gaik Heok di No. 32A, Dataran Tasek Timur 6, Taman Bercham Maju, Ipoh dan dengan itu kamu telah melakukan satu kesalahan dibawah Seksyen 3(a)(ii) Akta Pencegah Rasuah, 1961 (Undang-Undang Malaysia Akta No. 57), yang boleh dihukum dibawah Seksyen 3 Akta yang sama).

Tuduhan Ketiga:

Bahawa kamu pada 27 Januari 1997 jam lebih kurang 9.10 malam, di C.C. Coffee House, No. 22 Persiaran Bercham Selatan 2, Taman Desa Kencana, Ipoh, didalam Daerah Kinta, di dalam Negeri Perak sebagai seorang ejen Kerajaan Malaysia, iaitu Inspektor Polis No. I/12288 yang bertugas di Jabatan Siasatan Jenayah, di Ibu Pejabat Daerah Polis Ipoh, Perak telah secara rasuah menerima bagi diri kamu sendiri suatu suapan iaitu wang tunai sebanyak RM150.00 (Ringgit Malaysia Seratus Lima Puluh) daripada seorang bernama Ng Gaik Heok sebagai suatu dorongan kepada kamu untuk tidak melakukan satu perbuatan berhubung dengan hal-ehwal prinsipal kamu, iaitu untuk tidak mengambil tindakan keatas satu kelab perjudian haram yang diuruskan oleh Ng Gaik Heok di No. 32A, Dataran Tasek Timur 6, Taman Bercham Maju, Ipoh

dan dengan itu kamu telah melakukan satu kesalahan dibawah Seksyen 4(a) Akta Pencegah Rasuah, 1961 (Undang-undang Malaysia Akta No. 57) yang boleh dihukum dibawah Seksyen 4 Akta yang sama.

Kedua-dua kes ini dibicarakan bersama-sama dan dalam alasan penghakiman ini Tertuduh dalam kes 61-15-97 dikenali dengan Tertuduh pertama (OKT1) dan Tertuduh dalam kes 61-16-97 dikenali dengan Tertuduh Kedua (OKT2).

The appellants were convicted on all counts and appealed against the said decision.

Whilst reading the grounds of judgment of the learned Sessions Court Judge, I perchanced on a possible misdirection on the burden of proof in respect of the charges. I do not propose to dwell at length with the facts of the case. Suffice to say I eventually ordered a retrial based purely on this misdirection of law.

My reasons for doing so are as follows:

At the end of the prosecution case, the learned Sessions Court Judge in a rather terse decision had this to say in p. 135 of Appeal Record:

Kes 61-15-97. *PP. v. Ku Yahya* (2 pertuduhan)

Pihak pendakwa telah buktikan kes ketahap tanpa keraguan menasabah keatas OKT dalam kedua-dua pertuduhan. Tertuduh dipanggil membela diri atas kedua-dua pertuduhan.

Kes 61-16-97. *PP v. Insp Omar* (3 pertuduhan). Pihak pendakwa telah berjaya membuktikan kes ke tahap tanpa keraguan yang menasabah bagi ketiga-tiga pertuduhan terhadap OKT. OKT dipanggil membela diri atas ketiga-tiga pertuduhan.

Tiga pilihan diterangkan kepada kedua-dua OKT.

OKT1 memilih keterangan secara bersumpah.

OKT2 juga memilih memberi keterangan secara bersumpah.

Very little can be derived from this extract as to the prevailing state of mind of the learned judge in respect of whether the presumption under the Act was invoked in respect of the said charges.

However in dealing with the charge under s. 3(a)(ii) of the Prevention of Corruption Act 1961 (hereinafter called the Act), in his grounds of judgment, the learned Sessions Court Judge after considering the evidence pertaining to this charge in great detail had this to say:

Berdasarkan alasan-alasan di atas, saya berpendapat bahawa pihak pendakwa telah membuktikan kes ke tahap keraguan yang munasabah dan kedua dua OKT di panggil untuk membela diri terhadap pertuduhan di bawah Seksyen 3(a)(ii).

I have no quarrel so far, but the learned Sessions Court Judge should have been more specific in his ruling on the fact that the defence was to be called on each of the charge or charges, under s. 3(a)(ii) of the Act against both the 1st and 2nd accused. Presumably the learned Sessions Court Judge saw it not fit to invoke the statutory presumption under s. 14 of the said Act in respect of these charges. It is entirely within his power to do so.

Further in his grounds of judgment on p. 196 of the appeal record, when discussing the charge under s. 4(a) of the said Act against both the accused, the learned Sessions Court Judge had this to say. I propose to reproduce in extenso what the learned judge had to say:

Pertuduhan di bawah s. 4(a)

(i) Tertuduh telah menerima suapan pada 27.1.97

Seperti yang telah saya bincangkan terdahulu iaitu (dibawah kesalahan Seksyen 3(a)(ii) setelah mendengar keterangan saksi-saksi SP4 dan saksi perangkap serta P7 dan P7A telah dibuktikan bahawa OKT(1) dan OKT(2) telah menerima suapan tersebut. Wang perangkap telah ditemui dari OKT(1) dan OKT(2) seperti yang diberitahu oleh SP7 dan SP8. Perjumpaan wang memadai sebagai keterangan sokongan.

(ii) Seperti yang dibincangkan terdahulu – (dibawah pertuduhan 3(a)(ii) bahawa kedua-dua tertuduh adalah pegawai kerajaan maka anggapan dalam seksyen 14 terpakai maka OKT(1) OKT(2) perlu mematahkan anggapan undang-undang. Pihak pendakwa telah membuktikan kes ke tahap tanpa keraguan yang menasabah. Kedua-dua tertuduh dipanggil membela diri.

Thus it is visibly clear that he had invoked the presumption under s. 14 of the said Act, for the charges under s. 4(a) of the said Act.

In the concluding paragraph of his grounds of judgment however p. 206 the learned Sessions Court Judge had this to say:

Akhir sekali Encik Roni bagi pihak OKT(2) merujuk kepada *PP v. Mat* [1963] MLJ 263 dan memohon mahkamah membebaskan OKT(2). Bagaimanapun setelah mendengar keterangan pembela – saya tidak menerima dan tidak percaya dengan pembelaan OKT(1) dan OKT(2) dan pembelaan mereka tidak menimbulkan keraguan yang menasabah keatas kes pihak pendakwa. Pembelaan kedua-dua OKT(1) dan OKT(2) adalah penafian semata-mata.

> Mengenai hukuman keatas mereka saya berpendapat ini adalah hukuman yang berpatutan dan menasabah.

It was this paragraph that provoked grave concern and I invited counsels, and Deputy Public Prosecutor, to address me on the burden of proof where a presumption is invoked.

It is an indisputable fact that the principle of Malaysian Criminal law, is that, the general burden of proof lies throughout the trial, on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similiar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal the accused duty is merely to cast a reasonable doubt in the prosecution case.

Having said this in the course of a prosecution's case, the prosecution may rely on any available statutory presumptions to prove one or more of the essential ingredients of the charge. For purposes of the Prevention of Corruption Act 1961, this presumption is found in s. 14 of the said Act, which for convenience reads as follows:

> Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, the gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved.

When the prosecution is minded in invoking the presumption then the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumption on a balance of probabilities. This from a defence point of view is heavier than the burden of casting a reasonable doubt, but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. So much for the law.

Judging from the tenor of the grounds of the learned Sessions Court Judge, it would seem patently clear that he had invoked presumption of s. 14 of the said Act, when calling for the defence of both the accused for the charge under s. 4 of the said Act. Having done so, it behoves then on the defence to rebut this presumption on a balance of probabilities. The learned Sessions Court Judge failed to appreciate the distinction involved, when invoking the said presumption, in terms of the burden of proof, which as I have mentioned, rests with the accused, to rebut on a balance of probabilities. The learned Sessions Court Judge instead went on to hold, that having heard the defence of both the accused, which was a complete denial, the accused, had failed to create a doubt in the prosecution's case.

This is obviously a misdirection of law, as it should have been held that the accused had failed to rebut the presumption invoked under s. 14 of the Act, on a balance of probabilities for the charge under s. 4(a) of the Act.

The learned Sessions Court Judge, has also to my mind in a very cursory manner dismissed the defences of both the accused on the charges, both under s. 3(a)(ii) and s. 4(a) of the said Act by this singular statement. To my mind it is incumbent on the learned Sessions Court Judge, as a separate exercise to decide whether the charges under s. 3(a)(ii) of the Act has been established beyond reasonable doubt by the prosecution, or if the presumption was invoked, whether the accused has rebutted it, on a balance of probabilities. I wish to reiterate that even if the presumption is invoked it does not detract the duty of the prosecution to still prove its case beyond reasonable doubt. The learned judge has not done so, and this in itself is enough to occasion a miscarriage of justice.

The learned Deputy Public Prosecutor had urged me in submissions, that in the light of the overwhelming evidence to maintain the convictions despite this erroneous direction of law on the burden of proof. Regrettably I am unable to do so for unlike the case of *PP v. Khoo Hi Chiang* [1994] 2 CLJ 151; [1994] 1 MLJ 265, wherein the Supreme Court had held in ruling that the High Court had applied the wrong standard of proof in calling for the defence but nevertheless went on to hold that it did not vitiate the conviction. This is as explained by Edgar Joseph Jr SCJ at p. 292-295:

> ... although the judge applied the Haw Tua Tau test – which, in our view, was the wrong test – when calling for the defence, we consider that the error was of no consequence, and did not vitiate the convictions, because, even had he applied the more stringent test to which we have referred and discussed, we are completely convinced that the result would have been the same, having regard to the absolutely overwhelming nature of the case for the prosecution. We are therefore satisfied that no substantial injustice has actually occurred and so we apply the proviso to s. 60 of the Courts of Judicature Act 1964, which says:
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> > Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
> >
> > Accordingly, we have no hesitation in dismissing these appeals and confirming the convictions and sentences of death passed against both the appellants.

The power under which the Supreme Court acted in *Khoo Hi Chiang (supra)* is a power that is specifically enacted for that court, and the Court of Appeal in the Courts of Judicature Act 1964. However, no such power is vested with the High Court.

Such a misdirection of law on the burden of proof, cannot as suggested by the Deputy Public Prosecutor be passed over lightly as a mere irregularity, because it is incurably illegal as being in contravention of a strictly imperative provision. *Re Tan Boon Liat @ Allen & Anor etal* [1977] 2 MLJ 108. The trilogy of cases of *Harun bin Abdullah v. PP* [1998] 2 AMR 1983, *PP v. Surandran a/l Rajaretnam* [1998] 3 CLJ 184; [1998] 2 AMR 1260 & *Ishak Shaari v. PP* [1997] 3 CLJ Supp 223, have enucited that a misdirection of such a nature goes to the very root of the matter as it involves a principle of general importance in the administration of justice. The same view was expressed by the Supreme Court in *Yap Sin Hock v. PP* [1992] 2 MLJ 714. As such I could not have affirmed the conviction or reversed it as suggested by the respective counsels. In *Thomas v. R* [1960] 102 CLR 584 a retrial was ordered where there was a misdirection on the standard of proof. Accordingly I quashed the conviction and set aside the sentence imposed and ordered a retrial before another Sessions Court Judge.